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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1210

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM HART
Counsel for Respondent
Manufacturers Hanover Trust Company
10 East 40th Street
New York, New York 10016

HART & HUME
ROBERT BEAU LEONARD
Of Counsel

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Respondent Manufacturers Hanover Trust Company opposes the petition of Petitioner Alitalia-Linee Aeree Italiane, S.p.A. (Alitalia) for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit, on the ground that there are no special and important reasons for such review within the meaning of Rule 19 of this Court.

Statement of the Case

The major issue presented by this case is not whether the courts below were correct in their "common-sense reading" of Article 20 of the Warsaw Convention, but rather whether, as a factual matter, Alitalia took sufficient security precautions to protect the $200,000 in United States currency which was in Alitalia's charge in its Cargo Building 86 inside John F. Kennedy International Airport. The district court, whose opinion was adopted by the court of appeals, held that Article 20 of the Warsaw Convention required of Alitalia

> "proof, not of a surfeit of preventatives, but rather, of an undertaking embracing all precautions that in sum are appropriate to the risk, *i.e.*, measures reasonably available to [Alitalia] and reasonably calculated, in cumulation, to prevent the subject loss." 429 F.Supp. 964, 967 (S.D.N.Y. 1977).

The district court then found, as a matter of fact, that Alitalia

> "did not take all reasonable measures that prudent foresight would have envisioned for the securing of high-value cargo." 429 F.Supp. at 968.

The district court found that Alitalia took certain measures to secure high value cargo held in its custody, "all [of which] combined to demonstrate that [Alitalia] had not been wholly unmindful of nor unmoved by considerations of security." 429 F.Supp. at 968. These measures consisted primarily of keeping high value cargo in a locked valuables room; hiring an armed guard to sit in front of

the valuables room; refusing to accept the shipment until the guard had arrived; maintaining a log-book record of high value cargo; and taking certain precautions to prevent undue circulation of documents reflecting a shipment of high value cargo. However, after hearing the testimony of six witnesses called by Alitalia to testify on this subject, and on the basis of many documents received in evidence, the district court found that the measures taken by Alitalia

> "would be, predictably enough, likely unavailing in the circumstance of an armed robbery. . . ." 429 F. Supp. at 968.

The district court found that Alitalia did not take at least three measures which it should have taken as reasonable precautions against armed robbery.

Access into and through Cargo Building 86 should have been restricted. The importance of restricting access to the cargo area was confirmed by every witness who testified on the subject and by numerous documents in evidence. Nevertheless, the district court found that access into Cargo Building 86 and through it was unrestricted and that

> "restrictions on access to and through Building 86 . . . might have discouraged or frustrated robbery, if not insured against it." 429 F.Supp. at 968.

There should have been an enclosure around the valuables room and its guard, which would have permitted the guard to challenge a person approaching the valuables room before that person was close enough to overpower him. The armed guard employed by Alitalia was not in a position to challenge persons approaching him and was

found by the district court to have been positioned "no more securely than the proverbial sitting duck." 429 F. Supp. at 968.

There should have been a silent alarm system with a direct connection to the switchboard of the Port Authority Police. Several witnesses and many documents in evidence confirmed that a silent alarm system with direct connection to the police is an important and effective security measure, but Alitalia admittedly had no alarm system or any other kind of emergency summoning system in Cargo Building 86 at the time of the robbery, having removed an existing alarm system a few years earlier and re-installed it in what was then a new import warehouse off the grounds of the airport. The district court found that

> "armed robbery might have been prevented—or ultimately stymied—had a silent alarm system, with direct connection to the Port Authority police station, been installed on the premises of Building 86. . . ." 429 F.Supp. at 968.

Argument

Contrary to Alitalia's suggestion, the district court's interpretation of Article 20 of the Warsaw Convention is not inconsistent with the plain meaning of the Convention or with any case law or authority on the subject, but rather is, as the district court stated, "a common-sense reading" which is supported by the few cases on point and by the leading treatise on the Convention.

Alitalia concedes that in order to avoid its presumptive liability in this action, it must prove that it took "all necessary measures to avoid the damage" within the meaning of Article 20 of the Warsaw Convention. The term "all necessary measures" is not defined by the Convention. The district court held that

> "the phrase 'all necessary measures' cannot be read with strict literality, but must, rather, be construed to mean 'all *reasonable* measures.' " 429 F.Supp. at 967. (Emphasis in original.)

The district court therefore concluded that

> "In short, Article 20 requires of [Alitalia] proof, not of a surfeit of preventatives, but rather, of an undertaking embracing all precautions that in sum are appropriate to the risk, *i.e.*, measures reasonably available to [Alitalia] and reasonably calculated, in cumulation, to prevent the subject loss." 429 F.Supp. at 967.

Alitalia's disagreement with the district court's interpretation seems to turn on the word "all", which Alitalia seems to suggest should be read out of the Convention and replaced with the word "any". We believe that there is no support for Alitalia's proposed construction of the Convention. The carrier's conduct must be viewed in its totality; the court cannot, as Alitalia would have it do, isolate a particular act of the carrier, find that act to have been reasonable and hold that the carrier has, as a result, satisfied its burden under the Warsaw Convention. *Wing Hang Bank, Ltd.* v. *Japan Air Lines Co., Ltd.*, 357 F.Supp. 94 (S.D.N.Y. 1973); *Ritts* v. *American Overseas Airlines, Inc.*, 1949 U.S. Aviation R. 65 (S.D.N.Y. 1949); *Rugani* v. *K.L.M. Royal Dutch Airlines*, 4 Avi. 17,257 (New York City Court 1954), aff'd 285 App. Div. 944, 139 N.Y.S. 2d 899 (1st Dept. 1954), aff'd, 309 N.Y. 810 (1954).

Alitalia suggested to the courts below that the standard of "all necessary measures" is analogous to the standard of "due diligence" as used in determining liability in maritime law. However, the cases which apply the "due diligence" standard do not absolve the shipowner of liability simply because he took some reasonable measures, if there were other reasonable measures which he should have taken and did not. *Ore Steamship Corporation* v. *D/S A/S Hassel,* 137 F.2d 326 (2 Cir. 1943); *The Anaconda,* 60 F.2d 898 (2 Cir. 1932); *California and Hawaiian Sugar Refining Corp.* v. *Winco Tankers, Inc.,* 278 F.Supp. 648 (E.D.La. 1968). See also, *Cameco, Inc.* v. *S.S. American Legion,* 514 F.2d 1291 (2 Cir. 1974); *Walker* v. *Harris,* 335 F.2d 185 (5 Cir. 1964), cert. denied 379 U.S. 930, 13 L.Ed.2d 342, 85 S.Ct. 326 (1964); *General Foods Corporation* v. *The Troubador,* 98 F.Supp. 207 (S.D.N.Y. 1951).

The district court concluded that the Warsaw Convention does not impose absolute liability upon the carrier for loss of, or damage to, goods and that "the phrase 'all necessary measures' cannot be read with strict literality ...." 429 F.Supp. at 967. In this regard, the district court was plainly in accord with the authors, commentators and foreign cases referred to in Alitalia's petition. The district court's determination that "Alitalia did not take all reasonable measures that prudent foresight would have envisioned" is amply supported by the evidence and raises no special or important reason for review by this Court.

Conclusion

Alitalia's petition for a writ of certiorari to review the judgment herein of the United States Court of Appeals for the Second Circuit should be denied.

New York, New York
March 27, 1978

Respectfully submitted,

WILLIAM HART
Counsel for Respondent
Manufacturers Hanover Trust Company
10 East 40th Street
New York, New York 10016

HART & HUME
ROBERT BEAU LEONARD
Of Counsel